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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-707

W. D. ATKINS, JR.,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent.

On Application for a Writ of Certiorari
to the Supreme Court of Louisiana

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

W. D. Atkins, Jr., through his undersigned counsel, respectfully petitions this Honorable Court for a writ of certiorari to review the opinion and judgment of the Supreme Court of Louisiana, rendered on June 19, 1978 in these proceedings numbered 61,156 of the Docket of the Louisiana Supreme Court.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is reported at 360 So.2d 1341-48, a copy of which is annexed hereto as Appendix A. There is no published opinion of the Fifteenth Judicial District Court for the Parish of Lafayette, State of Louisiana, in which this criminal case was tried.

GROUNDS ON WHICH SUPERVISORY JURISDICTION INVOKED

The judgment of the Supreme Court of Louisiana was rendered on June 19, 1978. A copy thereof is annexed hereto as Appendix A.

A timely petition for rehearing was denied on July 26, 1978. The denial of rehearing is not published. A copy of the order denying rehearing of this appeal is annexed hereto as Appendix B.

On July 28, 1978, Honorable Joe W. Sanders, Chief Justice of the Supreme Court of Louisiana, stayed execution of the decree of the Supreme Court of Louisiana for a period of ninety (90) days from July 26, 1978, to permit petitioner to obtain review by this Honorable Court of the proceedings had in the court of the State of Louisiana. Petitioner respectfully requests that the Clerk of this Honorable Court issue to the Clerk of the Supreme Court of Louisiana a certificate that this petition is timely filed so that the stay previously granted will be made to continue in effect pending the hearing and determination of this cause by this Honorable Court. The Stay Order is annexed hereto as Appendix C.

Jurisdiction of this Honorable Court to review the judgment and opinion of the Court below upon a petition for a writ of certiorari is conferred by 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the denial of petitioner's motion for a continuance of the trial in order to obtain the testimony of a crucial defense witness denied due process of law to petitioner.

2. Whether the filing of a bill of particulars on the day of the trial, setting forth as a theory of this prosecution amounts over and beyond the amount set forth in the indictment and alleging different means by which the alleged theft was allegedly accomplished, denied petitioner's right to due process, including sufficient notice in advance of the trial of the nature and cause of the accusation as to be able to prepare a defense against the added allegations.

3. Whether the verdict, based upon the affirmative vote of only five of the six jurors involved, comports with due process of law.

4. Whether there was any proof of all of the essential elements of the alleged theft.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution, in relevant part, provides:

> * * * nor shall any State deprive any person of * * * liberty, or property, without due process of law * * *.

La. R.S. 14:67, in relevant part, provides:

> Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practice, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.
>
> * * *

Art. 709, La.C.Cr.P., provides:

> A motion for a continuance based upon the absence of a witness must state:
>
> (1) Facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial;
>
> (2) Facts and circumstances showing a probability that the witness will be available at the time to which the trial is deferred; and
>
> (3) Facts showing due diligence used in an effort to procure attendance of the witness.

STATEMENT OF THE CASE

Petitioner is an attorney who was accused and convicted of theft of his client's funds.

Originally, the client, Mrs. Pamela B. Gray, retained the services of Mr. Lucius A. Hornsby, Jr., Esquire, an attorney, to represent her in a claim arising out of the death of her husband from whom she was legally separated but not divorced at the time of the husband's death. The client entered into a contract with interest in the cause of action, pursuant to La. R.S. 37:218, and that contract was filed and recorded in the Office of the Clerk of the United States District Court for the Western District of Louisiana, thereby creating a lien in the interest of Mr. Hornsby.

The client subsequently retained the services of petitioner, who reached an agreement with Mr.

Hornsby to withhold from any settlement or judgment on behalf of the client the expenses advanced by Mr. Hornsby to or on the client's behalf and the previous contract with Mr. Hornsby was agreed to be null and void.

Petitioner made advances to the client, paid the expenses of investigation of the cause of action, *etc.*, and paid some personal expenses of the client during the pendency of the settlement in this case. Petitioner committed himself to pay other expenses on behalf of the client when the settlement was obtained.

After much negotiation with claims people from CNA Insurance Company, petitioner negotiated a settlement of $82,500.00 (of which $15,000.00 was to go to the questionable child of the decedent) and a waiver of contribution by the client of the several thousand dollars obtained from the Workmen's Compensation insurance carrier. The total dollar value of the settlement was $89,517.73.

Paragraph 4a of the contract of employment with petitioner contained the following fee provisions:

> c. In the event this matter involves a claim under the Workmen's Compensation Act, or similar law, that amount provided for therein shall be the fee, provided however, that in the event of a third party action arising out of such case, "client" agrees to pay attorney one-half of the "gross amount" collected, which "gross amount" specifically includes that amount, if any,

> paid as reimbursement for compensation or medical expenses to "client's" employer, whether settled, suit is filed, or appeal is taken.
>
> d. "Gross amount" is hereby agreed between the parties to mean any funds recovered by attorney on behalf of client for any reason, which is to be paid to client, or which is to be paid to any other person, firm, corporation, or insurance company as reimbursement of amount paid for any reason.

Petitioner also recorded his contract with an interest in the cause of action, filing same in the Court in which the suit was pending on behalf of the client. Thus, two recorded contracts with interest in the suit were on file in this case. The attorney for the insurance company and other defendants thus called Mr. Lucius A. Hornsby, Jr., to inquire about his position with regard to his recorded contract. That attorney advised the defense attorney that he was entitled to participate in the settlement negotiations and the settlement of the case. That attorney then promptly filed suit in intervention on the client's cause of action for his one-third fee stipulated in his recorded contract. This brought the settlement negotiations to a standstill until petitioner furnished the following indemnity agreement to the insurance company:

January 28, 1975

Mr. Don R. Long
Claims Representative
CNA Insurance Company
804 Jefferson Street
Lafayette, Louisiana 70501

Re: Pamela B. Gray

Dear Sir:

In accordance with our agreement to settle this matter, and in reference to the claims for attorney's fees by attorney Lucius Hornsby:

I hereby agree to indemnify, hold harmless, and to defend all parties released herein by Pamela B. Gray, including, but not limited to CNA Insurance Company, Fidelity & Casualty Company, Pennzoil United, Inc., Coating Specialists, Inc., Pennzoil Producing Company, Pennzoil Company, and the officers and directors thereof, in any claim brought by Lucius A. Hornsby, Jr., arising out of his prior representation of said Pamela B. Gray, against any of the above parties, and agree to pay in full any and all amounts obtained, if any, by said Lucius A. Hornsby, Jr., by way of settlement, judgment, or otherwise, together with any costs, interest, attorney fees, and costs of defense.

Please advise immediately of any action taken by Mr. Hornsby, so that I may take whatever action is appropriate.

Sincerely,
/s/ W. D. ATKINS, JR.
W. D. Atkins, Jr.

* * * *

On the basis of petitioner's personal indemnification, the insurance company agreed to resume the settlement negotiations.

The settlement on behalf of the minor child and the estate of the deceased husband was administered in the State Court. On February 3, 1975, the client was called to petitioner's office to execute the various forms which were required for her to become the tutrix for the minor child and to release the various defendants in the pending civil action. She signed these forms in the presence of petitioner's investigator and secretary. Among the forms she signed was an agreement to deposit her share of the settlement funds with petitioner, with interest to accrue thereon at the rate of 8% per annum, pending the settlement of the intervention claims pending in the suit. In addition to Mr. Hornsby's intervention, the parents of the client's deceased husband intervened for the full recovery. The insurance company agreed to pay them $5,000.00 to compromise their claim in intervention, over and beyond the compromised settlement with petitioner's client. Prior thereto, however, the insurance company had required of petitioner the same type of indemnity it required with regard to Mr. Hornsby's claim in intervention. Petitioner personally indemnified the insurance company with regard to that latter claim. That claim, however, was settled by the insurance company and the defendants were released by the deceased's parents four days after the settlement with petitioner's client.

On the day following the settlement with petitioner and his client, petitioner issued to the client a check in

the amount of $400.00. On February 12, 1975, he gave the client an additional $200.00. And on February 18, 1975, petitioner gave his client a check for $6,000.00.

According to the client's testimony at the trial of this cause (as well as on the civil proceedings), the client said she was not permitted to read the papers she signed, including the agreement to permit petitioner to hold the funds until all claims were settled. She did acknowledge her signature on the said agreement. The reason allegedly given for this refusal to allow her to read the documents was that there was inadequate time to do so before they were due in court. Significantly, there was time on that occasion for the client to write out a full-page renunciation of a previous agreement with a third party which was to have become due when the settlement was paid. The client had agreed to purchase a house from another person and to make an $11,000.00 down payment thereon out of the settlement proceeds. Meanwhile, she lived in the house and was supposed to have paid rent, but reneged also on that agreement. The client testified that the Court explained the agreement in release of the insurance companies and other defendants in the civil action. The deposit agreement between petitioner and the client was not shown to have been among the papers presented to the Court.

The client endorsed the check and gave it to petitioner. Petitioner co-endorsed it and deposited it in a bank account in Baton Rouge, Louisiana. The $6,600.00 previously mentioned was drawn out of that account on February 4, 12 and 18, 1975. For some reason not explained in the testimony, other than that she had

trouble communicating with petitioner and getting money from him, petitioner decided to see yet another attorney. She saw Mr. Robert Wright, Esquire, and gave him a long story, which Mr. Wright put in writing for her and sent to petitioner in the form of a demand letter. Petitioner was given a period of 24 hours to pay over to the client the balance of the settlement after fees and expenses were deducted, without concern that petitioner had personally indemnified the civil defendants against loss resulting from a judgment in favor of the intervenor, Hornsby. Petitioner was in Mexico at the time of the arrival of this letter. When he returned, he not only found the demand letter waiting for him; the client had also submitted a complaint to the Louisiana State Bar Association and Mr. Wright had filed suit on her behalf against petitioner, demanding the full settlement award without reduction for fees or anything else.

At that time, petitioner became hostile toward his client and refused to pay over any other money. At a deposition on the civil action, he furnished to the client's new attorney, Mr. Wright, a worksheet showing that after deduction of his fees and expenses and obligations to pay the client's debts from the settlement award the client was due only $20,373.40, which he was holding as a deposit for the payment of Mr. Hornsby's attorney's fee if he should prevail on the intervention. There was an additional amount of $2,500.00 withheld as cash and fee for defending the intervention suit by Mr. Hornsby, which was added to the costs and expenses on the client's behalf if she was not going to live up to the agreement to deposit the funds with petitioner pending the Hornsby litigation.

The deposit agreement contained the agreement by petitioner not to charge a fee for defending the Hornsby intervention suit.

On the above evidence, the jury, by a vote of 5-1, returned a verdict of guilty of theft of property of $24,-122.76. These figures cannot be completely squared with the evidence but appear to be the sum of the $20,-373.40 withheld as Hornsby's fee if he should prevail, the $2,500.00 charged the client in contradiction to the terms of the agreement to allow the petitioner to hold and invest the funds with an 8% guaranteed return on her investment, and $1,199 which represented an unpaid dental bill which was due and accounted for in the itemization of amounts paid out and due on behalf of the client. The total of these figures is $24,072.40; $50.32 difference from the amount declared in the verdict.

At the scheduled trial date on January 18, 1977, the State's witness, Pamela B. Gray, who was subpoenaed failed to appear. The trial was re-scheduled over the petitioner's objection. When this matter was scheduled for trial on March 8, 1977, a defense witness, Mrs. Jeanette Deshotels, who had been subpoenaed but not served on January 18, 1977, was absent. That witness had been located after extensive investigation. She was in California where her husband was scheduled on the trial date to have his stomach removed. The defense had only recently located her; had not had time to go through the procedures for obtaining this out-of-state witness for trial; and had obtained an agreement from the witness to testify on petitioner's behalf in contradiction of the testimony of petitioner's client that she had not been allowed to read the

documents signed by her at the petitioner's office on February 3, 1975. The defense informed the Court that its absent witness was expected to so testify and to furnish evidence of the client's understanding of these documents. The defense outlined its diligent effort to locate and secure the presence of this witness, the agreement to testify and the sudden unexpected illness of her husband which prevented her from attending. The witness sent a telegram in which she agreed to testify after her husband's recovery from surgery. The Trial Court overruled petitioner's motion and this issue was presented to the Louisiana Supreme Court on appeal. That Court held petitioner's motion for a continuance to be without merit because the witness had not been subpoenaed to attend the trial on March 8, 1977. Petitioner contends this ruling deprived him the right to compulsory process of a favorable witness who was essential to his defense.

Five days before the scheduled trial of this case, after petitioner's numerous objections that the bill of particulars provided by the State was inadequate to state the nature and cause of the accusation against him, the State filed a lengthy bill of particulars. Petitioner objected that bill of particulars, too, was inadequate to charge an offense over which the District Court for Lafayette Parish had jurisdiction. On the day of the trial, the State filed yet another amended bill of particulars, adding to the aggregate amount of the theft alleged in the indictment a $1,199 unpaid doctor bill and alleging different means of alleged theft with respect to this and other funds. The defense renewed its previous objections to the sufficiency of the bill of particulars. The Court overruled that objection and

proceeded to trial. While acknowledging that the State's original answers to the petitioner's motion for a bill of particulars "provided little information relating to the acts which constituted the theft," the Louisiana Supreme Court held that the amended bill filed several days prior to trial sufficiently informed the defense of the nature and cause of the accusation "to enable him to identify the alleged criminal transaction and to prepare a defense." 360 So.2d at 1345. The Louisiana Supreme Court did not address the specific objectionable amended bill of particulars on the appeal or on the petition for rehearing.

Petitioner filed a motion for a new trial, urging that there was no evidence of a fraudulent taking by defendant or a specific intent to permanently deprive the client of the funds of the settlement. The client's agreement with petitioner was in evidence. The evidence showed that petitioner was not even present when the client executed the documents in connection with the settlement and the tutorship of the child. The evidence showed that the client endorsed the draft and handed it over to the petitioner voluntarily. The withdrawal of the funds were authorized by the agreement. And when the client's new lawyer filed suit, petitioner offered to settle in excess of the amount claimed to have been stolen. Petitioner made an offer to settle of $30,000.00. The Supreme Court of Louisiana, without detailing any evidence whatsoever, saying only that "Our review of the record indicates that the State presented at least some evidence of each of the essential elements of the offense * * *." 360 So.2d at 1348.

On rehearing, petitioner raised the jurisdictional issue, pursuant to *Ballew v. Georgia*, ___ U.S. ___, 98

S.Ct. 1028 (1978), that the 5-1 verdict in this 6-man jury trial was a deprivation of due process. The Louisiana Supreme Court denied the petition for a rehearing of this appeal.

REASONS FOR ALLOWING THE WRIT

1. The Supreme Court Of Louisiana Has Decided An Issue Of Constitutional Law In Conflict With The Terms Of The Sixth And Fourteenth Amendments To The Constitution.

It is conceded that under Art. 709, La.C.Cr.P., and under the Sixth and Fourteenth Amendments to the Constitution, the trial judge has discretion whether to grant a continuance on the ground of the absence of a material witness. *Ungar v. Sarafite*, 376 U.S. 575 (1964). We also concede that Art. 709, La.C.Cr.P., as written, provides adequate guidance to trial judges to properly exercise their discretion in ruling on such motions. Petitioner herein contends that the statute was applied against him in a manner which will not comport with due process of law and that the Trial Court therefore abused its discretion in this case.

As set forth in the Statement of the Case, *ante*, the petitioner's attorney had subpoenaed Mrs. Jeanette Deshotels to appear as a defense witness at the scheduled proceedings on January 18, 1977. The Sheriff was unable to locate and serve the witness. The prosecution's main witness was also absent that day. The State moved for, and obtained, a continuance over the petitioner's objection. By March 8, 1977, the said

defense witness had been located and had agreed to appear and to testify without a subpoena. A sudden family emergency prevented her from doing so. On the evening before the trial she so notified defense counsel via long distance telephone call and followed that with a telegram explaining her inability to attend and assuring her testimony at proceedings scheduled after her husband's recovery from the unexpected surgical emergency.

Mrs. Deshotels' appearance was necessary only if Mrs. Pamela B. Gray testified that she was not given an opportunity to read and did not understand the import of the agreement to allow petitioner to hold the settlement funds pending the solution of the intervention suits filed in her suit. The defense was therefore ready to proceed without her in January, when Mrs. Gray was also absent, and not in March, when Mrs. Gray was present and testified.

Other witnesses to the discussions surrounding the signing of these agreements and other papers were Mrs. Dorothy Roussell and Mr. Elton J. Dugas. Mrs. Roussell was a former secretary who did not remember the transaction; Mr. Dugas was petitioner's investigator, who brought the case to petitioner's office, and he subsequently became hostile toward petitioner for reasons which do not appear in this record. Mrs. Deshotels was the only unbiased witness who recalled this transaction.

The Louisiana Supreme Court's two reasons for affirming the judgment of conviction in the absence of Mrs. Deshotels' testimony were that the witness was

not under subpoena and her testimony would have related to an inadmissible conclusion that Mrs. Gray understood the terms and reasons for the agreement to allow petitioner to hold the funds.

Under the circumstances of this case, where Mrs. Deshotels was located in California only days before the scheduled trial, there simply was not time to subpoena her under Art. 741 *et. seq.*, La. C.Cr.P., Louisiana's statute adopting the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. Following the location of the witness, the defense would have had to prepare a petition to the Louisiana courts; get a hearing on that petition; prepare a certificate for signature by the Louisiana judge that the witness was essential in these proceedings; present that petition to the California courts; have process served on the witness; and have a hearing in the California courts. Art. 741, La. C.Cr.P.; West's Ann. Cal. Pen. Code §§1334-1334.6. Counsel, in the exercise of due diligence, did the next best and most practicable thing. He secured the agreement of the witness to appear without a subpoena. Under the circumstances of the witness' sudden family emergency, *viz.*, her husband's emergency need for stomach surgery, we submit the Trial Court abused whatever discretion it had in this matter and denied petitioner the benefit of compulsory process of an essential witness. As to the competency of Mrs. Deshotels' testimony, she could have testified to the circumstances on which she would have based her opinion that Mrs. Gray understood the nature of the documents, *i.e.*, what was said to Mrs. Gray and what Mrs. Gray said. She could have refuted Mrs. Gray's

testimony that she was not permitted to read the papers and their content was not explained to her. The conclusion sought to be elicited from Mrs. Deshotels was a natural inference to be drawn from her observation of the signing proceedings. She was competent to testify to that. *State v. Taylor*, 347 So.2d 172 (La. 1977); *State v. Passman*, 345 So.2d 874 (La. 1977); *State v. Roche*, 341 So.2d 348 (La. 1976); *State v. Anthony*, 166 La. 793, 117 So. 921 (1928).

The Sixth and Fourteenth Amendments to the Constitution give a defendant the right to compulsory process of witnesses in his favor, subject only to denial where the accused delays until the trial date to secure the attendance of his witnesses and things of that nature. The present case presents nothing like that and requires reversal of the judgment below.

2. The Supreme Court Of Louisiana Has Decided An Issue Of Constitutional Law In Conflict With The Notice Requirements Of The Sixth And Fourteenth Amendments To The Constitution.

The State Supreme Court acknowledged in its opinion that petitioner was furnished inadequate particulars until the amended bill of particulars was filed on March 3, 1977. The objection was made to the second amended bill of particulars which was filed on the day of trial, March 8, 1977. That amended bill provided:

> The State further amends its Answer to include the allegation that in addition to the manner in which the Defendant stole the victim's funds by withdrawing these funds from the bank account, defendant did not in any other fashion pay the money to which the victim was entitled and that Pamela Gray did not consent to the theft.

In *In re Ruffalo*, 390 U.S. 544, 550-551 (1968), this Honorable Court held that in a disbarment proceeding the respondent could not be forced to answer specifications which arose during the proceedings. This Court quoted the opinion of the dissenting Circuit Judge in that case, in which he said: "Such procedural violation of due process would never pass muster in any normal civil or criminal litigation." We respectfully submit the same is true for this last-minute change of the terms of the indictment.

Defense counsel was prepared to cross-examine the witness on the issue of petitioner's withdrawal of funds from the bank account — the only previously alleged means of the alleged theft. But when the means were supplemented to include different modes of theft, and then while the jury is waiting to be selected, does not comport with the sense of justice and fair play which even the most conversative construction of the Fourteenth Amendment Due Process Clause would require.

For the foregoing reasons, this Court should grant a writ of certiorari and reverse the judgment below.

3. The Refusal On Rehearing To Reverse The Judgment Based On A Verdict Of Five Of The Six Persons On The Jury Disregarded This Court's Opinion In *Ballew v. Georgia*, 98 S.Ct. 1028 (1978).

The Louisiana jury trial scheme has been before this Honorable Court on several occasions. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court established that a defendant in a state court, who is subject to punishment in excess of six months imprisonment or $500.00 fine is entitled to a trial by jury. In *Williams v. Florida*, 399 U.S. 78 (1970), this Court held that the Due Process Clause of the Fourteenth Amendment did not require that juries be composed of twelve persons. A six-man jury was approved. In *Johnson v. Louisiana*, 406 U.S. 356 (1972), this Court held that the requirement of unanimity, which existed under common law at the time the Constitution was written, was not necessary to due process under the Fourteenth Amendment. In *Ballew v. Georgia*, ___ U.S. ___, 98 S.Ct. 1028 (1978), this Court held the Georgia (and Louisiana) five-man jury to be unconstitutional.

The present case presents the issue whether a six-man non-unanimous jury can comport with due process if a unanimous verdict by the same number of jurors, *i.e.*, five, would not.

In approving the 6-man jury in *Williams*, this Court said (399 U.S. at 100):

> * * * But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers twelve — *particularly if the requirement of unanimity is* retained. * * *

Following *Johnson* and *Williams*, the Louisiana Legislature amended Art. 782, La.C.Cr.P., to provide, in relevant part:

> * * * Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, five of whom must concur to render a verdict.

Petitioner respectfully submits that Art. 782, La. C.Cr.P., as amended by Art. 1975, 1st Ex. Sess., No. 16, §1, is unconstitutional as a violation of the cross-sectional and reasonable doubt requirements of the Sixth and Fourteenth Amendments with regard to jury trials.

It would be inconsistent that a unanimous verdict of five persons would be any less worthy of constitutional sanction than would a six-person jury returning a verdict by the same number of persons which, in *Ballew*, was found inadequate to pass constitutional muster. Under the Louisiana system of jury trial *post-Johnson*, even the smaller jury has been made non-unanimous. The jury in this case convicted petitioner with only five persons concurring therein. This is squarely contrary to the *dictum* in *Williams* that the smaller jury is acceptable if unanimity is retained.

Since this Court has not previously decided this important point of constitutional law affecting the present majority of jury trials in Louisiana, and possibly in Georgia when its legislature attempts to provide for the most conviction-prone jury which is constitutionally tolerable, it should do so in this case.

4. The Louisiana Supreme Court Has Not Properly Applied The Rule Of *Thompson v. City of Louisville* And *In Re Winship* Which Requires The Existence Of Proof Of Every Fact Essential To Constitute The Crime Charged.

Louisiana has interpreted the rule of *Thompson v. City of Louisville*, 362 U.S. 199, 204 (1960), to require it to rule on a motion for judgment of acquittal or a new trial based on the absence of the required evidence only in cases where the accused alleges there to have been "no evidence" of an essential element of guilt. This rule comports with the interpretation of *Thompson* made by Federal Courts in habeas corpus cases and is not questioned herein. Petitioner strongly contests the declaration, without explanation, that a review of the record in this case "indicates that the State has presented at least some evidence of each of the essential elements of the offense * * *." 360 So.2d at 1348.

There was absolutely no evidence at all that, at the time petitioner received the endorsed check from his client, he had any intent to deprive her permanently of the proceeds of her settlement. Petitioner was personally liable to the insurance companies and other

defendants in the civil suit for the payment of any costs, attorneys' fees and judgment obtained by an intervenor in the suit. If petitioner had not had some means of controlling the funds, he would have never agreed to personally indemnify the defendants. It was obvious during the negotiations that the client's indemnification would not be adequate. In the civil suit deposition, admitted in evidence herein, petitioner explained that the issue of his client's right to recover, as well as that of her minor daughter's rights, were very tenuous. The deceased had filed suit for separation alleging fault on the client's part. Art. 2334, La. Civ. Code, provides:

* * *

> Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property.

The minor child, according to the decedent's suit for separation, was not the issue of the client and the deceased husband. The client had the child before her marriage to the decedent. The decedent paid no alimony or child support. In all legal likelihood, the parents of the client's deceased former husband were entitled to the cause of action, not the client. Petitioner sought to settle the suit on her behalf before the insurance companies, during discovery, learned of the relationship existing between the deceased and the client. Had petitioner not persuaded the client to go along with the indemnity arrangement, with him holding the funds, the discovery would have commenced.

All of these things were contingent liabilities of petitioner for which common sense dictated that he protect himself. That is what he did when he entered the agreement with the client and settled the suit.

As to an intention to permanently deprive the client of the funds which were not delivered to her, petitioner delivered a substantial amount more than the terms of the agreement called for during the three weeks after the suit was settled. He paid her $6,600.00. He had agreed only to pay her the same amount weekly as she had been receiving from Workmen's Compensation — less than $200.00 per week.

The client precipitated her own troubles by reneging on her agreement and seeking other counsel to coerce petitioner to deliver to her the funds he was holding to protect himself in the intervention cases.

We respectfully submit there was absolutely no proof to justify this conviction and, as this Court said in *Thompson, supra:*

> if the evidence fails to prove all * * * elements of this * * * charge, the conviction is not supported by evidence, in which event it does not comport with due process of law. * * *

CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment below upon a writ of certiorari, after which it should reverse the judgments of the Louisiana courts.

Respectfully submitted,

RISLEY C. TRICHE
TRICHE, STERNFELS & NAIL
Attorneys at Law
P. O. Drawer 339
Napoleonville, LA. 70390
Telephone: [504] 369-6168

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Risley C. Triche, a member of the Bar of the Supreme Court of the United States, certify that the requisite number of copies of the foregoing Petition for a Writ of Certiorari have been served on the Attorney General of the State of Louisiana by mailing three copies of same to him at his office in Baton Rouge, Louisiana, this ____ day of October, 1978.

RISLEY C. TRICHE
Attorney at Law

APPENDIX A

SUPREME COURT OF LOUISIANA

NO. 61,156

STATE OF LOUISIANA

VERSUS

W. D. ATKINS, JR.

Appeal from the Fifteenth Judicial District Court,
Parish of Lafayette,
Honorable Hugh E. Brunson, Judge.

Filed: June 19, 1978

DENNIS, Justice.

Defendant W. D. Atkins, Jr. was charged by short form indictment with "a theft of $20,373.46 in U. S. currency belonging to one Pamela B. Gray in violation of the provisions of R.S. 14:67." Following a jury trial, defendant was found guilty as charged and sentenced to six years at hard labor. On appeal Atkins relies upon ten assignments of error for reversal of his conviction and sentence.

ASSIGNMENTS OF ERROR NOS. 1 AND 2

Defendant contends that the trial court erred in denying his motion to quash the indictment, both as to the indictment standing alone and as to the indictment when considered in light of the state's answers to the defendant's motion for a bill of particulars. He

presents four specific arguments for our consideration: (1) an essential averment was deleted from the short form indictment because of the failure to specify the value of the property taken; (2) the indictment and bill of information failed to state an offense which occurred within Lafayette Parish; (3) the indictment and answers to the bill of particulars failed to provide the defendant with adequate information concerning the charges against him; and (4) a transcript of defendant's deposition, taken in a civil case involving the same parties and introduced by stipulation at the hearing on the motion to quash, indicates defendant's innocence of the charged offense.

We will consider the arguments in the order presented:

(1) The defendant's contention that the short form indictment was fatally defective for failure to set forth the value of the stolen property is unmeritorious. The allegation that defendant was guilty of theft of "$20,373.46 in U. S. currency" sufficiently fulfills the requisites of the statutory short form indictment, since the value of all stolen property must, of necessity, be expressed in monetary terms.

(2) Defendant's second argument in effect urges that the prosecution was brought in an improper venue because the indictment, along with the State's answers to the bill of particulars, does not allege that any element of the charged offense occurred in the parish where the trial was scheduled. La. C.Cr.P. art. 611. However, defendant's motion to quash the indictment did not contain an allegation that the venue was

improper. La. C.Cr.P. art. 615. Nevertheless, even in the absence of a motion to quash for improper venue, the State must prove proper venue at trial beyond a reasonable doubt. La. C.Cr.P. art. 615; State v. Frank, 355 So.2d 912 (La. 1978); State v. Dillon, 260 La. 215, 255 So.2d 745 (1971). While this Court may not weigh for sufficiency the State's evidence as to venue, when the jury has determined the issue adversely to the defendant by a verdict of guilty, we may, provided that the issue is presented by the defendant's motion for a new trial, grant relief if there was no evidence whatsoever as to the proper venue. State v. Dillon, *supra; see also,* State v. Richard, 245 La. 465, 158 So.2d 828 (1963). In the instant case, however, the defendant's motion for new trial contained no allegation that the State had failed to prove that the proper venue of the charged offense was Lafayette Parish. Moreover, our review of the record indicates that there is substantial evidence that an "act or element" of the offense of theft occurred in Lafayette Parish. Defendant's second contention relating to the motion to quash lacks merit.

(3) Defendant contends that the trial court erred in determining that the short form indictment and the State's answer and amended answer to the bill of particulars gave him sufficient information to prepare a defense. Article I, §13 of the Louisiana Constitution of 1974 grants an accused the right to "be informed of the nature and cause of the accusation against him." One implementation of this constitutional guarantee is Louisiana Code of Criminal Procedure Article 484, which gives to a criminal defendant the right to require the district attorney to furnish a bill of particulars "setting up more specifically the nature and cause of the charge against [him]." Although a defen-

dant is not entitled by a bill of particulars to discover the details of the evidence with which the State expects to prove its case,[1] and although the trial court is vested with wide discretion in determining the sufficiency of the State's answers,[2] this Court has found reversible error in the failure to provide information of the nature and cause of the accusation against the accused as required by the constitution. For example, in State v. Miller, 319 So.2d 339 (La. 1975), in reversing a conviction on these grounds, this Court set forth some of the factors to be considered in determining whether a defendant was given all of the information to which he is constitutionally entitled:

> "The state is required, upon defendant's motion, to provide a criminal defendant with enough information so that he can identify the criminal transaction. There is no exact formula which can be applied to every charge to determine in a particular case whether a defendant has all of the information to which he is constitutionally entitled. In general, however, the extent to which the bill should be granted turns on the complexity of the case. If the crime is a single event, such as a murder, the scope of the bill will be less extensive than it will be if the crime involved is a series of occurrences, such as tax fraud or bootlegging.

1 *See, e.g.*, State v. Ford, 349 So.2d 300 (La. 1977); State v. O'Blanc, 346 So.2d 686 (La. 1977); State v. Jenkins, 338 So.2d 376 (La. 1976); State v. Marks, 337 So.2d 1177 (La. 1976). This rule was modified as to future prosecutions by Act 515 of 1977.

2 State v. Huizar, 332 So.2d 449 (La. 1976); State v. Nelson, 306 So.2d 745 (La. 1975); State v. Vince, 305 So.2d 916 (La. 1975); State v. Bailey, 261 La. 831, 261 So.2d 583 (1972).

> When a crime charged may be committed in a number of different ways, this Court has always recognized the accentuated need for the state to furnish particulars. Likewise, when the crime involves not a single occurrence but a series of occurrences, the state must supply enough information so that the accused can identify each criminal transaction. 319 So.2d at 340-1. [citations omitted]

In the instant case, the State's original answer to the defendant's motion for a bill of particulars provided little information relating to the acts which constituted the alleged theft. However, prior to trial, the State amended its answers to provide a detailed summary of the manner in which the offense was committed. Defendant was informed that he was charged with the theft of a specific amount of money from a particular identified client between the dates of February 3, 1975 and July 17, 1975 by taking them from an account in the American Bank & Trust Company in Baton Rouge which defendant had opened for the purpose of safekeeping and investment of the funds. Although the State could not inform defendant of the exact time and manner of the taking the information was specific enough to enable him to identify the alleged criminal transaction and to prepare a defense. Therefore, we find that defendant's contention relating to the sufficiency of the answers to the bill of particulars is meritless.

(4) Defendant contends that the trial court erred in failing to quash the indictment because the defendant's deposition, which was taken in connection with

a civil action involving the victim of the alleged offense and introduced by stipulation at the hearing on the motion to quash, indicated that the defendant was innocent of the charged offense.

The question of factual guilt or innocence of the offense charged is not properly raised by the motion to quash. State v. Rembert, 312 So.2d 282 (La. 1975). Further, the only issue presented to the trial judge for his consideration was whether the indictment charging the defendant with theft was insufficient as a matter of law or unconstitutionally vague. Since the instant objection was not contemporaneously urged, and since the trial judge could not at any rate have properly considered the issue of guilt or innocence in such a proceeding, defendant's contention is insubstantial.

ASSIGNMENT OF ERROR NO. 3

Defendant contends that the trial court erred in failing to grant a motion for a continuance based upon the absence of a material witness. La. C.Cr.P. art. 709, which governs applications for continuance based upon the unavailability of witnesses, provides:

> "A motion for a continuance based upon the absence of a witness must state:
>
> "(1) Facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial;

> "(2) Facts and circumstances showing a probability that the witness will be available at the time to which the trial is deferred; and
>
> "(3) Facts showing due diligence used in an effort to procure attendance of the witness."

In the instant case, the victim of the alleged theft was a client of defendant, an attorney. The State's theory of the case was that defendant wrongfully misappropriated funds which he received as the proceeds of a settlement between Mrs. Gray and an insurance company following the death of her husband. Following the settlement, Mrs. Gray and defendant entered into a contract which allowed him to hold and invest the proceeds, at his discretion, for a certain period of time.

Prior to trial, defendant sought a continuance because Janice Deshotels, his former secretary and a witness to the signing of the contract, was absent from the state and presently unavailable to testify at trial. At the hearing on the motion, defendant's counsel stated that the witness, who was in California where her husband had recently undergone surgery, would testify that Mrs. Gray understood the contract and that the defendant was not present when the contract was signed, thereby refuting any charge of misrepresentation which the State might make. Defendant's counsel further stated that, although he had not issued a subpoena to compel the attendance of Mrs. Deshotels, he had only recently learned of her location, and she had informed him by telegram that she would appear in three to seven weeks.

The trial judge, in his per curiam to the instant assignment of error, stated that defendant's failure to subpoena Mrs. Deshotels indicated that the codal requisite of due diligence had not been met; he further stated that he believed that the witness' testimony as to Mrs. Gray's understanding of the contract would be inadmissible because the witness would be stating a conclusion of law.

Our review of the record reveals no abuse of discretion on the part of the trial judge which would constitute reversible error under the prior decisions of this Court.[6] The trial court's finding that under the circumstances the defendant's failure to subpoena the witness indicated a lack of due diligence,[7] and its holding that defendant did not demonstrate that material, admissible testimony would be produced if the continuance were granted, is supportable under the record in this case. Since we find that the trial judge's decision did not constitute an abuse of the discretion accorded him under the article, we find defendant's third assignment of error to be without merit.

ASSIGNMENTS OF ERROR NOS. 4 AND 5

Defendant contends that the trial judge erred in refusing to grant a mistrial when the prosecutor re-

6 This Court in the past has demonstrated a noticeable reluctance to reverse in Article 709 cases absent a clear showing of abuse on the part of the trial judge. *See, e.g.*, State v. Chavers, 294 So.2d 489 (La. 1974); State v. Valentine, 262 La. 571, 263 So.2d 893 (1972).

7 For cases holding that the "due diligence" requirement is ordinarily not satisfied when defense counsel fails to have the potential witness subpoenaed, *see*, State v. Terry, ___ So.2d ___ (La. 1978), No. 61,288; State v. Bennett, 341 So.2d 847 (La. 1977); State v. Larue, 324 So.2d 384 (La. 1975); State v. Elias, 230 La. 498, 89 So.2d 51 (1956).

ferred in his opening statement to defendant's deposition and worksheet which were taken in a civil proceeding involving the same parties. He further asserts that the court's admonition to the jury was insufficient to mitigate the damage ensuing from the prosecutor's remarks. The prosecuting attorney stated:

> "The money was not paid and a suit was filed on behalf of Pamela Gray against W. D. Atkins for payment of the money that she claimed she was entitled to. During the proceedings of this suit, Mr. Wright took Mr. Atkins deposition in a civil matter, took his testimony, and as a result of that, a certain worksheet was produced by Mr. Atkins explaining how . . . ."

At this point, defense counsel objected and moved for a mistrial on the basis of Louisiana Code of Criminal Procedure Article 767, which provides that the prosecution "shall not, in the opening statement, advert in any way to a confession or inculpatory statement made by the defendant." The court denied the motion, but did admonish the jury that "the statements made by either side in this matter on opening statement . . . as any statements of facts, are not evidence and should not be considered by you as such." Defendant asserts that the court's refusal to grant the motion for a mistrial constitutes reversible error. The State, however, contends that the deposition and worksheet were exculpatory rather than inculpatory in nature and that, in any event, the defendant suffered no prejudice since the documents were subsequently introduced into evidence. Since we agree with

the latter assertion, we find it unnecessary to reach the issue of whether the documents constituted inculpatory statements within the contemplation of Article 767.

In State v. Snedecor, 294 So.2d 207, 209 (La. 1974), this Court considered a defendant's contention that the prosecutor, in his opening statement, had violated the mandate of Article 767. Therein this Court stated:

> "Defendant contends that the prosecutor's reference in his opening statement to a 'police informer', 'bugged automobile', 'mike', and 'tape recorder' made the jury aware that the State had an inculpatory statement of the defendant. Thus the denial of defendant's motion for a mistrial under Article 767 of the Code of Criminal Procedure was erroneous.
>
> "The article states: 'The state shall not, in the opening statement, advert in any way to a confession or inculpatory statement made by the defendant.' The reason for this prohibition is that, should the confession or statement *not* be admissible at trial, the jury's knowledge of its existence is prejudicial to defendant's rights. However, where the statement is subsequently introduced at trial, there can be no prejudice to the defendant flowing from the reference in the opening statement."

See also, State v. Rodry, 270 So.2d 508 (La. 1972).

The situation presented in the instant review is similar to that found in the Snedecor case. Since the

civil deposition and "worksheet" of the defendant were introduced into evidence at trial, he could not have been prejudiced by the references to them in the prosecutor's opening statement. Accordingly, we find that defendant's fourth and fifth assignments of error lack merit.

ASSIGNMENT OF ERROR NO. 6

In this assignment of error defendant contends that the trial court erred in allowing Mrs. Gray to testify as to her state of mind at the time defendant originally received the settlement funds and whether she was allowed to read the settlement contract because defendant was accused of a theft without the consent of the victim and not a taking by means of fraud. The trial court did not err in allowing Mrs. Gray to testify. Defendant's conduct toward his client at this time was relevant to show the nature of his intent at the time of later disbursements of the settlement funds from the bank account and also tended to prove a lack of consent by Mrs. Gray to later takings.

This assignment lacks merit.

ASSIGNMENT OF ERROR NO. 10

Defendant contends that the trial court's refusal to give requested special jury charges constitutes reversible error. Louisiana Code of Criminal Procedure Article 807 gives to both the state and the defense the right to submit to the court special written charges for the jury. The article further requires the court to charge the jury pursuant to the written request if "it

does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent." However, the charge need not be given if it is included in the court's general charge to the jury, or if it forms a part of another special charge which is given by the court.

Our examination of the record indicates that the trial court did not err in refusing defendant's special charges numbers one and eight. Both of these charges were attempts to set forth the necessary elements which the state must prove in order to establish the commission of the crime of theft, a matter fully covered by the trial judge in his general charge. Therefore, the charges were properly refused. State v. Luckett, 327 So.2d 355 (La. 1976). Accordingly, we find defendant's tenth assignment of error to be meritless.

ASSIGNMENT OF ERROR NO. 11

In this assignment, defendant complains of the action of the trial court in allowing the prosecuting attorney, during closing argument, to distribute to the jury copies of documents which had already been introduced into evidence and examined by the jury at the time of their admission. Louisiana Code of Criminal Procedure Article 744 provides that closing argument "shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the State or defendant may draw therefrom, and to the law applicable to the case."

In State v. Rowell, 306 So.2d 668 (La. 1975), this Court found no error in a procedure whereby the jury was

allowed to examine, during closing argument, evidence which had previously been admitted but which had not been examined by the jury at that time. The defendant argues that Rowell is distinguishable because, in the instant case, the jury had already viewed the evidence, and its subsequent distribution to the jury resulted in its being accorded undue weight. Our reading of Rowell, however, indicates that the court approved the procedure not because the jury had not previously viewed the documents, but because they had been introduced into evidence prior to the commencement of the closing argument. Therefore, we find that the trial judge did not err in permitting the evidence to be displayed to the jury during closing argument.

Further, we find no merit to the defendant's argument that he was prejudiced by the distribution of multiple copies, rather than a single copy, of the documents in question. Defendant has failed to demonstrate any prejudice resulting from a procedure which was apparently intended only to facilitate the jurors' viewing of the exhibits. Defendant's tenth assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 12 AND 13

Defendant contends that the trial court erred in overruling his motion for a new trial, which was based upon the contention that the state presented no evidence of certain essential elements of the crime of theft. Our review of the record indicates that the State presented at least some evidence of each of the essential elements of the offense; therefore, we find that the

trial judge did not err in his ruling. *See*, State v. Finley, 341 So.2d 381 (La. 1977). Accordingly, we find defendant's final assignments of error to be meritless.

For the reasons herein expressed, defendant's conviction and sentence are affirmed.

[SEAL]
SUPREME COURT OF LOUISIANA
A TRUE COPY
OCT. 23, 1978
/s/ ANDREW J. FALCON
DEPUTY CLERK

APPENDIX B

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

October 23, 1978

UNITED STATES OF AMERICA
STATE OF LOUISIANA
SUPREME COURT OF THE
STATE OF LOUISIANA
New Orleans, 70112

I, Andrew J. Falcon, Deputy Clerk, Supreme Court of the State of Louisiana, do hereby certify that the Court

took the following action on July 26, 1978, in the matter entitled State of Louisiana vs W. D. Atkins, Jr., No. 61,-156:

"Rehearing refused"

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the Court aforesaid, at the City of New Orleans, this the 23rd day of October A.D., 1978.

/s/ ANDREW J. FALCON
Deputy Clerk
Supreme Court of the
State of Louisiana

[SEAL]

APPENDIX C

SUPREME COURT OF LOUISIANA

NUMBER 61,156

STATE OF LOUISIANA
Plaintiff-Appellee

versus

W. D. ATKINS, JR.
Defendant-Appellant

Appeal from the Fifteenth Judicial District Court
Lafayette Parish, Louisiana
Honorable Hugh E. Brunson, Judge

PETITION FOR STAY OF EXECUTION ON BEHALF OF DEFENDANT-APPELLANT, W. D. ATKINS, JR.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA:

The petition of W. D. Atkins, defendant in the above numbered and entitled cause, with respect represents:

I.

That the decree of this Honorable Court affirming the verdict and sentence of the District Court for the Parish of Lafayette, is final, this Court having refused an application for a rehearing on 26th day of July, 1978.

II.

Petitioner avers that the opinion and decree of this Honorable Court deprives him of his rights guaranteed him under Article 1, Section 2 of the Constitution of the State of Louisiana and by the Sixth and Fourteenth Amendments of the Federal Constitution and that he was tried and convicted, over his protest, without due process of law, to-wit:

That the State's response to the defendant's Bill of Particulars was improper in that the answers were constitutionally unacceptable under State and Federal standards because of the inadequacy in notifying defendant of the nature of the charges against him.

III.

Amended answers to the Bill of Particulars were given defendant a few minutes before the commencement of the trial failing to comply with "due process" of law under the 14th Amendment of the United States Constitution and the applicable State Constitutional provisions.

IV.

That the Trial Judge erred in failing to give requested special charge number 1 — that is that there must be a concurrence at one time of the essential elements of the offense of theft. In this connection, the Louisiana Criminal Code Article 8 defining criminal conducts states:

"Criminal conduct consists of:

1) An act or failure to act that produces criminal consequences, and which is combined with criminal intent; or

2) A mere act or failure to act that produces criminal consequences, where there is no requirement of criminal intent; or

3) Criminal negligence that produces criminal consequences."

The charge requested was not fully covered by the Trial Judge's general charge. They were correct. They did not require further explanation.

The failure to give a requested special charge which is wholly correct and pertinent, and which does not require qualification, limitation, or explanation is a violation of "due process" of law under the Fourteenth Amendment of the United States Constitution. It is also prejudicial to the substantial rights of the accused and constitutes a substantial violation of a constitutional or statutory right. The statutory right is founded in Louisiana Code of Criminal Procedure Article 807.

V.

That the defendant raises the question of there being a total lack of evidence of the elements of the offense for which he is accused. In this connection, and it must be pointed out, that if the State's answers to the Bill of Particulars were only sufficient in their amended answers, that the amended answers charged an offense in Baton Rouge and therefore there could be *no proof* of an offense in Lafayette Parish. Thus, as a matter of law by the State's amended answers to the particulars, the Motion for New Trial should have been granted.

Further, on the facts in this case, there is absolutely no showing that the defendant whenever requested personally by Pamela B. Gray failed to provide her with any funds due her. The testimony shows that she talked to him only one time and that whatever funds she requested were furnished. All of the other

testimony relates to her conversations with some third person for whose conduct the defendant is not answerable under the laws of principles. Further, the worksheet filed in evidence and the testimony shows that substantial funds have been paid to Pamela Gray or paid in her account. It also showed a reserve of substantial funds in the approximate amount of the alleged theft for the contigency of litigation of a claim of another attorney who asserted attorney's fees arising out of the settlement proceeds. Thus, the defendant, ATKINS, never claimed, according to the worksheet, title or ownership of the funds in question.

Finally, in view of the facts in this case, there is TOTALLY NO PROOF OF SPECIFIC INTENT to commit theft. At most, it shows a dispute between an attorney and his client concerning the disbursement of the proceeds of a settlement. Perhaps bad judgment may have been used. This, however, can not be translated into affirmative evidence of specific intent to commit theft.

VI.

That the record in this case shows that the defendant was tried by a six-man jury and that its verdict was five for "guilty" and one for "not guilty". Such a trial violates the defendant's rights under the Sixth and Fourteenth Amendments of the United States Constitution. Specifically, a trial jury of only five persons has been held to be in violation of the Sixth and Fourteenth Amendments of the United States Constitution by the United States Supreme Court in *Ballew v. Georgia*, ___ U.S. ___, 98 S.Ct. 1029 (1978). In the

Ballew case, an unanimous five-man jury was involved. In the present case, with a 6-man jury involved with 5 for "guilty" and 1 for "not guilty", it would seem that 5 minus 1 equals 4 and that the present trial is at least one juror less constitutional than the jury in the *Ballew* case.

In effect, the Louisiana 6-man jury is nothing in the world except the unconstitutional unanimous 5-man jury under the *Ballew* case and one additional vote which does not count.

VII.

Petitioner avers that he timely raised the said questions in the lower court at the time of his arraignment and after his conviction in a motion for a new trial and in this Court by his Assignment of Errors.

VIII.

Petitioner further avers that he is desirous of applying to the Supreme Court of the United States for a writ of certiorari and review, or appeal, to review the decision of this Honorable Court upon the issues hereinabove raised and as shown by the record in this case; and that petitioner desires that he be given a stay or delay in which to apply to said Court; and that the decree or mandate of this Honorable Court be stayed so that petitioner will have an opportunity to so present his application to the Supreme Court of the United States for relief.

WHEREFORE, petitioner prays that after due consideration that this Honorable Court grant him a reasonable stay of execution and that he be permitted a delay of ninety (90) days in which to prepare and file in the Supreme Court of the United States his application for a writ of certiorari or appeal to review the decision of this Honorable Court and that the mandate and decree of this Honorable Court be withheld accordingly.

Petitioner further prays for all general and equitable relief.

Respectfully Submitted,

TRICHE, STERNFELS
& NAIL
ATTORNEYS AT LAW
P. O. DRAWER 339
NAPOLEONVILLE,
LOUISIANA 70390
/s/ RISLEY C. TRICHE
Risley C. Triche
Attorney for Defendant

Counsel for petitioner, W. D. Atkins, Jr., hereby certifies that the foregoing petition and application is made in good faith and counsel further certifies that he verily believes that petitioner is entitled in law to the relief sought.

/s/ RISLEY C. TRICHE
RISLEY C. TRICHE

ORDER

Let petitioner be granted a stay of execution of the decree of this Honorable Court for a period of ninety (90) days from July 26, 1978.

New Orleans, Louisiana, this 28th day of July, 1978.

/s/ JOE W. SANDERS
CHIEF JUSTICE

CERTIFICATE

I certify that a copy of the above and foregoing Petition for Stay of Execution has been mailed to J. Nathan Stansbury, District Attorney in and for the 15th Judicial District Court, Lafayette Parish, Louisiana, this 28th day of July, 1978.

/s/ RISLEY C. TRICHE
RISLEY C. TRICHE

OFFICE OF THE CLERK
SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

July 28, 1978

Hon. O. C. Guilliot
Clerk of Court
Parish of Lafayette
P. O. Box 2009
Lafayette, La. 70501

Re: 61,156 - State of La. vs. W. D. Atkins, Jr.

Dear Sir:

Enclosed herewith is a petition for Stay of Execution on behalf of Defendant-Appellant, W. D. Atkins, Jr., which was signed by Chief Justice Joe W. Sanders on this date.

Please be guided accordingly.

Yours truly,
Harold A. Moise, Jr.
Clerk
/s/ ANDREW J. FALCON
Deputy Clerk

AJF/kf

ccs: Hon. Hugh E. Brunson
Hon. J. Nathan Stansbury
Risley C. Triche, Esq.
Barbara Rutledge

Supreme Court, U. S.
FILED
JAN 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-707

W. D. ATKINS, JR.,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

BRIEF OF STATE OF LOUISIANA, RESPONDENT

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
OF LOUISIANA

J. NATHAN STANSBURY
FIFTEENTH JUDICIAL
DISTRICT ATTORNEY

WILLIAM J. BURRIS
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-707

W. D. ATKINS, JR.,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

BRIEF OF THE STATE OF LOUISIANA, RESPONDENT

STATEMENT OF THE CASE

Petitioner, W. D. Atkins, Jr., is an attorney who was accused and convicted of the theft of funds of his client. Petitioner had represented Pamela B. Gray and her daughter in a wrongful death action resulting from the death of her husband, Thomas Gray. Petitioner ob-

tained a settlement of $89,517.73 in February of 1975. As of the date of the filing of the bill of information on July 17, 1975, Mrs. Gray, despite many requests and demands for her funds, received nothing except relatively small advances. The State indicted Mr. Atkins on July 17, 1975 with having committed a theft from Pamela Gray sometime between February 3, 1975 and the date of the bill of information (July 15, 1975).

The Louisiana Theft Statute is a combination of several crimes which involve a permanent taking. It includes such common law crimes as larceny, embezzlement, and fraud. R.S. 14:67 reads in pertinent part as follows:

> "Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practice or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential."

The instant case is a good illustration of why these crimes were combined within one Statute. The State was faced with a crime that undoubtedly had been committed but could have been committed by any one of the manners proscribed in the Statute. Through the course of events between February 3, 1975 and July 15, 1975, it was quite obvious that Mr. Atkins had the intent to permanently deprive Mrs. Gray of her settlement funds. Mr. Atkins even tried to justify his actions by rendering a worksheet actually showing that Mrs. Gray was not entitled to any remaining funds. Mr. Atkins had placed $20,000.00 of the funds in a checking account of another business venture not related to his legal practice. (The Tropical Fish Bowl). Before July 15, 1975, the "client's account" had been depleted and was closed.

ARGUMENT

I.

Petitioner claims that he was denied his right to compulsory process of witnesses by the failure of the trial judge to grant a continuance. Petitioner had requested the continuance due to the failure of a defense witness to appear for court. In fact, the petitioner did not seek compulsory process by requesting a subpoena. Sometime between January 18, 1977 and March 8, 1977, counsel states that the location of Mrs. Jeanette Deshotels was learned. The exact date she was located was never shown. Petitioner's claim that there was not enough time is without support. He could have tried to get process and the Court would have been able to determine if in fact there was not enough time. However, defendant did not try to secure compulsory process, so it is not within the trial court or this court's knowledge as to whether he did or did not have time. Instead of seeking compulsory process, the defense states that it depended upon an agreement by the

witness to appear. The defense made the allegation at the hearing on the motion for continuance that a family emergency prevented the witness from appearing.

"The matter of continuance is traditionally within the discretion of the trial Judge." *UNGAR v. SARAFITE*, 376 U.S. 575, 589, 84 S.Ct. 841, 849. The denial of a continuance will not ordinarily be reviewed by the Supreme Court. *AVERY v. ALABAMA*, 308 U.S. 444, 446, 60 S.Ct. 321, 322 (1940). Only "a myopic insistence upon expeditiousness in the face of a justifiable request for delay" should result in a reversal. *UNGAR*, Ibid at page 589 (U.S.), page 849 (S.Ct.). In *UNGAR*, the court further stated:

> "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *UNGAR v. SARAFITE*, 376 U.S. 575, 589, 84 S.Ct. 841, 850."

It is clear that the trial judge acted within his sound discretion in denying a continuance without any attempt to secure compulsory process.

II.

Petitioner claims that he did not receive proper notice under the Sixth and Fourteenth Amendments

due to the fact that he did not receive adequate answers to bills of particulars. Petitioner was charged by Indictment on July 17, 1975 and was at that time, informed of the crime he was charged with and the victim of the crime. Five days before trial defendant was further informed that he was charged with a theft of a certain amount of money from a client between February 3, and July 17, 1975 by taking them from an account in a bank in Baton Rouge which petitioner had opened for safekeeping of the funds. The defense wanted the State to do something that was impossible for the State to do, specify the exact time and the exact manner of taking the funds. The State did, however give information sufficient for the petitioner to identify the alleged criminal transaction and to prepare a defense. *STATE v. ATKINS*, 360 So.2d 1341.

A defendant in a criminal case has a right to know with reasonable certainty the nature of the accusation against him. There must be a statement of facts sufficient to inform the accused of the specific offense he is charged with. *RUSSELL v. UNITED STATES*, 369 U.S. 749, 765, 82 S.Ct. 1038, 1047-1048. In *COCHRAN AND SAYRE v. UNITED STATES*, 157 U.S. 286, 290, 15 S.Ct. 628, 630 the court stated:

> "The true test of the sufficience of an indictment is not whether it could have been made more definite or certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are

> taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Also see UNITED STATES v. DEBRAW, 346 U.S. 374, 74 S.Ct. 113; HAMLING v. UNITED STATES, 418 U.S. 87, 94 S.Ct. 2887."

Petitioner had sufficient information from the Indictment and the answers to bills of particulars to know the specific crime he was charged with, to prepare for a defense, and to plead double jeopardy if tried for the crime again.

III.

Petitioner argues that the judgment of conviction based upon a verdict of five persons of a six person jury is unconstitutional in light of *BALLEW v. GEORGIA*, 435 U.S. 223, 98 S.Ct. 1028 (1978). It should first be noted that petitioner never objected to his mode of trial until his motion for rehearing before the Louisiana Supreme Court. It is the contention of the State that certiorari should be denied due to petitioner's failure to object until the case was on appeal. *ARTHUR JOHNSON v. UNITED STATES*, 225 U.S. 405, 32 S.Ct. 748; *FRAZIER v. UNITED STATES*, 335 U.S. 497, 69 S.Ct. 201.

The Louisiana jury trial scheme is set forth in Article I, Section 17 of the Louisiana Constitution of 1974. The

number of jurors and degree of unanimity increases with the harshness of the penalty. In the case of the harshest penalty (the possibility of capital punishment) the Constitution requires a unanimous verdict by a twelve person jury to convict or acquit. In cases where the penalty provision would require confinement at hard labor, a jury of twelve persons is required and a verdict is rendered for conviction or acquittal if ten of that number concur. In cases which could entail punishment with or without hard labor, a jury of six is required of which five must concur in the determination of guilt or innocence.

In petitioner's trial, he was accused of theft in an amount over $500.00. Louisiana Revised Statutes Title 14, Section 67. The penalty for this crime is imprisonment "with or without hard labor, for not more than ten years" or a fine not to exceed $3,000 or both. Therefore, a six person jury was impanelled. Mr. Atkins was convicted by the concurrence of five members of the jury.

It is clear that a six person jury is constitutional when a unanimous vote is required. *WILLIAMS v. FLORIDA*, 399 U.S. 78, 90 S.Ct. 1893 (1970). In *WILLIAMS* this Court made an exhaustive study of the history of the jury system and concluded that the number of twelve jurors was quite accidental. Ibid at page 90. The Court also explored the legislative history of the Sixth Amendment and determined that little intent could be derived from such an inquiry. It is interesting to note in

this regard that the final draft dropped provisions of the original draft requiring unanimity. Ibid at page 96. The Court therefore determined that the relevant inquiry as to jury trial matters must be viewed in relation to whether it furthers the purpose for which that particular aspect of the jury trial was created to safeguard. Measured by that standard, the Court determined that the twelve member jury was not an indispensable component of the Sixth Amendment. Ibid at page 100. The Court stated:

> "The purpose of the jury trial, as we noted in *DUNCAN*, is to prevent oppression by the government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' DUNCAN v. LOUISIANA, Supra, 391 U.S., at 156, 88 S.Ct., at 1451. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility that results from the group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. *WILLIAMS v. FLORIDA*, 399 U.S. 78, 100, 90 S.Ct. 1893, 1905-1906.

The Court in *WILLIAMS* did not require unanimity. In fact, the Court expressly reserved opinion on that matter. Ibid. Note 46.

The matter of whether unanimity was required in the jury trial system was decided in *JOHNSON v. LOUISIANA*, 406 U.S. 356, 92 S.Ct. 1620 and *APODACA v. OREGON*, 406 U.S. 404, 92 S.Ct. 1628. In *JOHNSON* the Court determined the constitutionality of Louisiana's nine out of twelve vote requirement and in *APODACA* it determined Oregon's ten out of twelve vote requirement. In other words, in *JOHNSON* the Court reviewed whether the vote of 75% of the jurors to convict or acquit was constitutional. In *APODACA*, the percentage was approximately 83% required to convict or acquit.

The Court in each case upheld the constitutionality of the respective statutes. The Court stated:

> "It is our view that the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt. *JOHNSON v. LOUISIANA*, 406 U.S. 356, 360, 92 S.Ct. 1620, 1623.

The Court clearly dealt with contention that a non-unanimous verdict was inconsistent with proof beyond a reasonable doubt. The Court stated:

"In considering the first branch of appellant's argument, we can find no basis for holding that the nine jurors who voted for his conviction failed to follow their instructions concerning the need for proof beyond such a doubt or that the vote of any one of the nine failed to reflect an honest belief that guilt had been so proved. Appellant, in effect, asks us to assume that, when minority jurors express sincere doubts about guilt, their fellow jurors will nevertheless ignore them and vote to convict even if deliberation has not been exhausted and minority jurors have grounds for acquittal which, if pursued, might persuade members of the majority to acquit. But the mere fact that three jurors voted to acquit does not in itself demonstrate that, had the nine jurors of the majority attended further to reason and the evidence, all or one of them would have developed a reasonable doubt about guilt. We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A ma-

> jority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position. At that juncture there is no basis for denigrating the vote of so large a majority of the jury or for refusing to accept their decision as being, at least in their minds, beyond a reasonable doubt. Indeed, at this point, a "dissenting juror should consider whether his doubt was a reasonable one . . . (when it made) no impression upon the minds of so many men, equally honest, equally intelligent with himself." ALLEN v. UNITED STATES, 164 U.S. 492, 501, 17 S.Ct. 154, 157, 41 L.Ed. 528 (1896). JOHNSON v. LOUISIANA, 406 U.S. 356, 360, 363, 92 S.Ct. 1620, 1624.

The Court very correctly reasoned that reasonable men can disagree and that such is not equivalent to failure of the State in its burden of proof. Ibid at U.S. page 362, S.Ct. page 1625. The Court makes an interesting observation in this regard concerning nonunanimity on the part of appellate judges. Extending that observation, if unanimity was required on questions of either law or fact by our appellate judges, it is doubtful that our judicial system could work. An eight to one appellate vote causes no problem, but one dissenting juror who disregards the reasonable argument of five (or eleven) others could result in a hung jury.

In 1978 the court decided the case of *BALLEW v. GEORGIA*, 435 U.S. 223, 98 S.Ct. 1029 declaring that Georgia's five person jury violated an accused's right to trial by jury. Under Georgia's legislation, all five members of the jury were required to concur in a verdict to convict or acquit. The Court left standing the constitutionality of the six person jury permitted in *WILLIAMS*, 98 S.Ct. 1029, 1038. It is clear that, under the Louisiana scheme, there are six persons in the group deliberation (as in *WILLIAMS*). There are six persons making critical contributions necessary for the solution of the problems involved as in *WILLIAMS*. There are the six memories as in *WILLIAMS* to draw on and not the five as in *BALLEW*. See Ibid at page 1035-1036. Certainly the same cross section of the community is selected. Ibid at page 1034. It seems clear that *BALLEW* does not affect the Louisiana Scheme because it upholds six person juries. The Louisiana system has six persons involved in meaningful deliberation, and remembering the important facts and arguments. It has six persons representing the common-sense of the entire community. See Ibid at pages 1039-1040.

The six persons (one alternate who did not deliberate) representing the common-sense of the community of Lafayette Parish, Louisiana heard approximately six hours of testimony during the trial and then deliberated on its verdict for one hour. The Court's instructions on the applicable law lasted one-half hour. The time of the trial was not so long as to affect a juror's memory of facts and arguments and the

time of deliberation of the jury on a relatively short trial obviously indicates a full and meaningful discussion of the guilt or innocence of the accused.

Much has been written about the affect of various numbers of jurors and probably an absolute decision on that subject will never be obtained (see citation of text in companion case *WRESTLE v. LOUISIANA*). There seems, to this writer, no guarantee of due process merely by numbers nor by unanimity. To say that this accused or any other does not get due process of law by a vote of five of six members can be nothing more than rank speculation.

It is clear that *JOHNSON* is authority for the constitutionality of the Louisiana jury scheme. The percentage of jurors concurring for conviction or acquittal are the same as in *APODACA* and even larger than the percentage in *JOHNSON*.

Petitioner in argument points to dicta in *WILLIAMS* (399 U.S. at 100) which would indicate that a unanimous jury verdict was required. However, the Court clearly reserved opinion on the matter. *WILLIAMS v. FLORIDA*, 399 U.S. 78, 100 n.46, 90 S.Ct. 1893, 1906 n.46. Just as clearly as that point was *dicta* in *WILLIAMS*, it was answered in *JOHNSON*, a later case. Petitioner's points concerning violation of cross-sectional and reasonable doubt requirements were clearly answered in *JOHNSON* and *APODACA*.

The State has a particular and compelling interest in this matter. Unanimity would increase the number of hung juries. This is true whether the overwhelming majority was for acquittal or conviction. A hung jury in cases where there was a great majority for either side requires an unnecessary use of further court time and results in additional expense. Even more important, in our mobile society further delay increases the chances of improper resolution of issues. In our jurisdiction a case in which a jury was hung would have to be rescheduled for a date approximately three months after the hung jury. Witnesses move, witnesses forget, witnesses may die, witnesses may get so annoyed at the system evidenced by the hung jury that they make themselves "unavailable". Therefore, a hung jury is detrimental to the true resolution of the facts. The State has a compelling interest to avoid such mistrials in situations where 83% of the jurors find a person guilty or innocent beyond a reasonable doubt.

The State would point out that this aspect of the case has also been briefed in the matter of *DANIEL BURCH and WRESTLE, INC. v. LOUISIANA*, October Term No. 78-90 and concurs in the arguments submitted by the State of Louisiana in that matter.

IV.

Petitioner claims that the State presented no evidence at all that at the time he received the funds that he had an intent to permanently deprive Mrs.

Gray of her funds. The case of *THOMPSON v. CITY OF LOUISVILLE*, 362 U.S. 199, 204, 80 S.Ct. 624 (1960) requires review and reversal only if there is no evidence of an essential element of the crime. If petitioner expects the State to show tangible evidence of his thoughts at the time he received the check, of course the State could not do so. However, the intent of the petitioner can clearly be ascertained from the totality of the events as they transpired. See La. R.S. 15:445; *STATE v. MCKINNON*, 317 So.2d 184 (1975); *MORISSETTE v. U.S.*, 342 U.S. 246, 276, 72 S.Ct. 240, 256 (1952). Placing the funds in non-professional business account is an indication of what Mr. Atkins intended. Not paying Mrs. Gray despite numerous demands over a six month period indicated his intentions. Giving a worksheet indicating that Mrs. Gray was entitled to nothing except a few small advances he had previously given indicated his intent. There were many offerings showing the requisite intent and to say that there was no evidence whatsoever is, the State contends, quite ridiculous.

CONCLUSION

The Writ sought herein having first been raised subsequent to the Louisiana Supreme Court affirming the conviction does not entitle the defendant to present himself before this Honorable Court to have his arguments heard. Petitioner seeks relief from alleged errors in the ruling of the trial court on such issues as continuance and sufficiency of answer to bill of particular,

which rulings were correctly made in accordance with statutes and jurisprudence and which do not present a federal constitutional question which would entitle petitioner to the relief sought. Finally, the constitutional provision for trial by jury for relative felonies in the State of Louisiana do not violate the due process clause for the United States Constitution. Wherefore, the State of Louisiana, through the undersigned, respectfully urges This Honorable Court to affirm the conviction obtained herein.

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CERTIFICATE

I, J. Nathan Stansbury, a member of the Bar of the Supreme Court of the United States, certify that the requisite number of copies of the foregoing Brief on Behalf of the State of Louisiana, Respondent, have been served on Risley C. Triche, Attorney for Petitioner, at his office in Napoleonville, Louisiana, 70390, this ____ day of January, 1979.

J. NATHAN STANSBURY